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NO. 84-1202 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

RIG HAMMERS, INC.,
Petitioner

v.

ODECO DRILLING, INC.,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To The Honorable Justices Of The Supreme Court Of The United States:

COMES NOW Odeco Drilling, Inc., the Respondent herein, and files this its Brief in Opposition to the Petition for Writ of Certiorari filed herein, and would show as follows:

STATEMENT OF THE CASE

Rig Hammers, Inc., the Petitioner herein, seeks review of a judgment the United States Court of Appeals for the

Fifth Circuit rendered on October 29, 1984, reversing the judgment of the United States District Court for the Eastern District of Texas in favor of Rig Hammers and remanding the cause for further proceedings consistent with the appellate opinion. The opinion of the Fifth Circuit is published under the style of *Voisin v. O.D.E.C.O. Drilling Co.*, 744 F.2d 1174 (5th Cir. 1984).[1] The memorandum opinion of the District Court is published under the style of *Voisin v. O.D.E.C.O. Drilling, Inc.*, 557 F.Supp. 715 (E.D. Tex. 1982).[2]

The central issue presented for review is whether the Petitioner's contractual obligation to procure liability insurance naming the Respondent as an additional assured was void under Section 905(b) of the Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C. § 905 (b). The Fifth Circuit Court of Appeals held that the contractual obligation was enforceable by the Respondent and was not prohibited by Section 905(b). The Petitioner also seeks review of a related issue concerning the damages that the Respondent is entitled to recover from the Petitioner by virtue of the latter's breach of contract.

A. Course of Proceedings and Disposition in the Courts Below

Andrew Voisin, an employee of Rig Hammers, Inc., instituted a cause of action against Odeco Drilling, Inc., the Respondent herein, and the vessel D/B OCEAN PRIDE on February 25, 1981, invoking the jurisdiction of the District Court pursuant to diversity of citizenship,

1. The Fifth Circuit's opinion is reprinted in Petitioner's Petition for Writ of Certiorari, Appendix A at pp. 1a-10a.

2. The District Court's memorandum opinion is reprinted in Petitioner's Petition for Writ of Certiorari, Appendix A at pp. 11a-27a.

and alleging entitlement to recover damages for personal injuries sustained in the course of his employment onboard the OCEAN PRIDE. Odeco answered and filed a Third-Party Complaint against Rig Hammers asserting two causes of action arising out of Rig Hammers' breach of a Master Service Contract between Odeco and Rig Hammers.

In February, 1982, Voisin filed an Amended Complaint, alleging a cause of action against Odeco and Rig Hammers pursuant to the Jones Act, 46 U.S.C. § 688 *et seq.* Odeco filed an Amended Answer and asserted a Cross-Claim against Rig Hammers arising from Rig Hammers' breach of the Master Service Contract.

The case came on for trial on March 29, 1982, at which time it was announced that the Plaintiff and Odeco had reached a settlement agreement wherein the Plaintiff would receive $75,000.00 exclusive of the lien for workers' compensation benefits previously paid to the Plaintiff. The District Court found the settlement to be fair and reasonable.

The Court then proceeded to trial on Odeco's Third-Party Complaint against Rig Hammers. On December 13, 1982, the District Court entered its Memorandum Opinion and Final Judgment. The District Court found that Voisin was a maritime employee within the meaning of the Longshoremen's & Harbor Workers' Compensation Act, and hence not a seaman under the Jones Act or the general maritime law. On the basis of this finding, the Court held that Odeco's claim for indemnity pursuant to Section 9 of the Master Service Contract was void under Section 905(b) of the Act. The District Court further held that the additional assured provisions con-

tained in Section 8(f) of the Master Service Contract fell within the proscriptive effect of Section 905(b), and therefore denied Odeco recovery against Rig Hammers.

After finding that the Intervenor, Gray & Co., Inc., was entitled to equitable subrogation against Odeco for compensation benefits paid to Voisin in the amount of $45,691.00, the District Court entered judgment for the Plaintiff against Odeco in the amount of $75,000.00, and judgment for Rig Hammers and Gray & Co., Inc. against Odeco Drilling, Inc. in the amount of $45,691.00. On February 16, 1983, the District Court denied Odeco's Motion to Amend Findings of Fact and Alter or Amend the Judgment. Notice of Appeal was filed by Odeco on February 28, 1983.

The sole issue presented on appeal was whether the District Court erred in holding that Rig Hammer's contractual obligation contained in the Master Service Contract between Odeco and Rig Hammers to procure insurance naming Odeco as an additional assured was void under Section 905(b). The Fifth Circuit entertained oral argument, and thereafter, on October 29, 1984, rendered its opinion. The Fifth Circuit held that Section 905(b) did not void the provision of the Master Service Contract requiring Rig Hammers to name Odeco as an additional assured in all of Rig Hammers' insurance policies, and that Rig Hammers had breached the Master Service Contract by failing to name Odeco as an additional assured.

The Court of Appeals reversed the decision of the District Court and remanded the cause for further proceedings consistent with the appellate opinion. Rig Hammers, Inc., the Petitioner herein, filed its Petition for Writ of Certiorari in the United States Supreme Court on January 26, 1985.

B. Statement of Facts

Andrew Voisin, an employee of Rig Hammers, was injured on or about May 2, 1979, while working onboard the D/B OCEAN PRIDE, a jack-up drilling rig owned by Odeco. Both Odeco and Rig Hammers were working under contract to Shell Oil Company, the operator of the well to be drilled. Voisin was employed by Rig Hammers as a supervisor of a casing crew which had been dispatched to the vessel to drive conductor pipe in preparation for drilling operations, and was injured while assisting the crew of the OCEAN PRIDE by operating a wrapping drum on the rig's drawworks in conjunction with an effort to stack conductor pipe in the rig's derrick.

A Master Service Contract dated October 22, 1976, was in force and effect between Odeco and Rig Hammers on the date of Voisin's injury. Section 8(f) of the Master Service Contract provided in relevant part:

> All policies of the Contractor [Rig Hammers], . . . shall name Company [Odeco] as an additional assured and shall be endorsed to waive Subrogation against Company [Odeco] and against all parties for whom Company may be working, with the exception of Workman's Compensation insurance. . . .

Under the provisions of this Section, Rig Hammers was obligated to have Odeco named without qualifications as an additional assured in all of Rig Hammers' insurance policies. Rig Hammers failed to satisfy this obligation. Odeco made appropriate and timely demands upon both Rig Hammers and Rig Hammers' insurance broker, Gray & Co., Inc., in an attempt to secure its insurance rights under the Master Service Contract. These demands were refused by Rig Hammers and Gray & Co., Inc.

ARGUMENT

The Petitioner urges that a writ of certiorari should be granted in this cause for two reasons. First, the Petitioner contends that the holding of the court of appeals is inconsistent with congressional intent underlying Section 905(b) of the Longshoremen's & Harbor Workers' Compensation Act, and inconsistent with this Court's prior decision in *Bisso v. Inland Waterways Corporation.*[3] Second, the Petitioner argues alternatively that the decision of the Fifth Circuit, which would require the Petitioner to respond in damages to Respondent for breach of contract, would be repugnant to the proscription of employer liability set forth in Section 905(b) of the Act.

The Respondent submits that the Fifth Circuit's ruling below was correct and that Petitioner's arguments do not reflect considerations that would support a discretionary review of this case by the Court on writ of certiorari. First, the decision of the Fifth Circuit is not in conflict with the decisions of this Court. The Fifth Circuit correctly held that the 1972 Amendments to the Act do not prohibit agreements between an employer and vessel owner respecting the procurement of insurance. While this Court has not had an occasion to consider the precise issue, the Fifth Circuit's construction of Section 905(b) and its legislative history is not in conflict with the relevant decisions of this Court.[4] Further, the holding of the Fifth Circuit below is not in conflict with this Court's decision in *Bisso v. Inland Waterways Corporation,* to the extent that the *Bisso* decision is applicable to the case at bar.

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3. 349 U.S. 85 (1955).

4. *See, e.g.,* Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156 (1981); Edmonds v. Compagnie Generale Transatl., 443 U.S. 256 (1979).

Second, the decision of the Fifth Circuit is not contrary to decisions rendered by other circuit courts. To the contrary, the Fifth Circuit's decision in the case at bar is fully supported by and consistent with the decision of the Ninth Circuit Court of Appeals in *Price v. Zim Israel Navigation Co., Ltd.*,[5] where the Ninth Circuit upheld the validity of an additional assured provision in a contract between a vessel owner and a stevedore in the face of an argument that the provision was nullified by the statutory proscription of employer liability in Section 905(b). The Petitioner's attempts to factually distinguish *Price* from this case and thus create an apparent "conflict" between the circuits are not persuasive.

A. There Is No Conflict With The Decisions Of This Court.

The Fifth Circuit Court of Appeals, after careful consideration of the 1972 Amendments to the Longshoremen's & Harbor Workers' Compensation Act and the legislative history thereto, held that Section 905(b) of the Act[6] does not prohibit an agreement between an employer and vessel owner respecting the procurement of

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5. 616 F.2d 422 (9th Cir. 1980).

6. 33 U.S.C. § 905(b). The section provides:

> (b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third-party in accordance with provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. . . . The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time of the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

insurance. While this Court has not had an occasion to consider this precise issue, it is clear that the Fifth Circuit decision is not in conflict with the decisions of this Court which have considered the effect of the 1972 Amendments to the Act.[7]

This Court's discussion and treatment of the 1972 Amendments in *Scindia Steam Navigation Co. v. De Los Santos*[8] is illustrative. Prior to the 1972 Amendments, an injured worker covered under the Act could receive compensation payments from his employer and also might obtain a judgment against the vessel owner if the injury was caused by the vessel's unseaworthiness or negligence. *Seas Shipping Co. v. Sieracki.*[9] Proof of unseaworthiness required no proof of fault on the part of the vessel other than the unsafe, injury-causing shipboard condition. This was true even if the condition was caused, created, or brought into play by the injured worker's employer or his co-workers.[10] In such event, however, the vessel owner could recover over and against the employer for a breach of an express or implied warranty of workmanlike performance. *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*[11]

The 1972 Amendments, particularly by adding Section 905(b), radically changed this scheme of things. The injured worker's right to recover for unseaworthiness was

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7. Refer to Note 4 *supra*.

8. 451 U.S. 156, 164-65 (1981).

9. 328 U.S. 85 (1946).

10. Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. at 164 & n.11. *See, e.g.*, Italia Societa v. Oregon Stevedoring Co., 376 U.S. 315 (1964).

11. 350 U.S. 124 (1956).

abolished. A right of recovery from the vessel for negligence was preserved in Section 905(b); however, it was provided that the employer should not be liable to the vessel for such damages directly or indirectly and that any agreements or warranties to the contrary would be void.[12]

An examination of the legislative history of the 1972 Amendments reflects that Congress' purpose in prohibiting both the direct and indirect liability of an employer under Section 905(b) was to foreclose all theories under which *Sieracki-Ryan* triangle suits might be brought[13] rather than to preclude insurance arrangements such as those contained in Section 8(f) of the Master Service Contract at issue.[14] The abolition of the employer's direct or indirect liability to the vessel under Section 905(b) was enacted as a *quid pro quo* for the elimination of the warranty of seaworthiness owed by the vessel to *Sieracki*-seamen,[15] and was clearly perceived by Congress as necessary to abolish the judicially created *Sieracki-Ryan* triangle that had effectively nullified the exclusive liability provision of former Section 905 of the Act with respect to employers.[16]

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12. Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. at 164.

13. H. R. Rep. No. 92-1441, 92nd Cong., 2d Sess. 7, *reprinted in* [1972] U.S. Code Cong. & Admin. News pp. 4698-4704. *See, e.g.,* Pippen v. Shell Oil Co., 661 F.2d 378, 386-87 & n.15 (5th Cir. 1981); Aparicio v. Swan Lake, 643 F.2d 1109, 1115-16 (5th Cir. 1983); Price v. Zim Israel Navigation Co., Ltd., 616 F.2d 422, 428 (9th Cir. 1980).

14. Price v. Zim Israel Navigation Co., Ltd., 616 F.2d at 428.

15. Pippen v. Shell Oil Co., 661 F.2d at 387 n.15.

16. H.R. Rep. No. 92-1441, *supra,* Note 13, *reprinted in* [1972] U.S. Code Cong. & Admin. News at p. 4702.

Thus, Congress enacted Section 905(b) to prohibit a vessel from seeking indemnity from the employer by agreement or otherwise. The statute, however, manifests no intention on the part of Congress to expand the proscriptive effect of Section 905(b) beyond an indemnity construct, and there is nothing in the 1972 Amendments nor in their legislative history evidencing a congressional intent to invalidate contractual agreements between an employer and vessel allocating the burden of procuring insurance. Nor have the relevant decisions of this Court ever intimated that the 1972 Amendments to the Act should be so construed.

Similarly, the decision of the Fifth Circuit Court of Appeals is not in conflict with this Court's decision in *Bisso v. Inland Waterways Corporation.*[17] In *Bisso,* the Court invalidated a towage contract providing that "the towing movement should be at the 'sole risk' " of the barge being towed.[18] The Court stated that historically, the two main reasons for invalidating exculpatory clauses had been (1) to discourage negligence by making wrongdoers pay damages, and (2) to protect those in need of goods or services from being overreached by others who have power to drive hard bargains. These reasons justified invalidating exculpatory clauses in towing contracts given the nature of the industry and the vessel owner's need to operate "free of monopolistic compulsions".[19]

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17. 349 U.S. 85 (1955).

18. *Id.* at 86.

19. *Id. See also* Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co., 372 U.S. 697 (1963), wherein this Court invalidated an indemnification agreement between a tug owner and a barge owner as being an exculpatory provision condemned by *Bisso.*

The Petitioner's assertion that the additional assured provision in the Master Service Contract is invalid under *Bisso,* however, rests on a fundamental misperception that an agreement respecting the procurement of insurance is by definition exculpatory. In the case at bar, the Fifth Circuit correctly held that the additional assured provision in the Master Service Contract was not invalid under *Bisso.*[20] The Fifth Circuit relied on its prior decision in *Twenty Grand Offshore, Inc. v. West India Carriers, Inc.,*[21] wherein the court of appeals rejected an argument that a co-insurance provision in a towing agreement was an indirect attempt to import into the agreement an exculpatory clause of the type invalidated by *Bisso.*

The *Twenty Grand Offshore* court clearly distinguished additional assured provisions from an indemnification clause, observing that nothing in the insurance agreement relieved the party for whom insurance was obtained from any liability resulting from its own negligence.[22] In articulating this distinction, the court of appeals correctly noted that the insurance provision resulted in a shifting of liability "neither by indirection nor otherwise."[23]

On this basis, the *Twenty Grand Offshore* court concluded that the insurance provision before it did not contravene the underlying policy of *Bisso* "to discourage negligence by making wrongdoers pay damages." For similar reasons, the second policy consideration of *Bisso* "to protect those in need of goods or services from being

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20. Voisin v. O.D.E.C.O. Drilling Co., 744 F.2d 1174, 1178-79 (5th Cir. 1984).

21. 492 F.2d 679 (5th Cir.), *cert. denied,* 419 U.S. 836 (1974).

22. *Id.* at 683.

23. *Id.*

overreached by others" is inapplicable in the factual context of the case at bar. Clearly, the mere existence of the additional assured provisions in the Master Service Contract without more evidences no overreaching.[24] Nor, as was found by the Fifth Circuit in the instant case,[25] is there any other evidence in the record to support such a conclusion.

The analysis of the *Twenty Grand Offshore* court is consistent with other decisions of the Fifth Circuit Court of Appeals,[26] as well as decisions in other circuits,[27] which have repeatedly emphasized that contractual insurance provisions such as the provision in the case at bar are not exculpatory clauses of the type invalidated by *Bisso.* Indeed, the courts of appeals consistently have upheld contractual insurance provisions against assertions of invalidity under *Bisso v. Inland Waterways Corporation.* Accordingly, the decision of the Fifth Circuit Court of Appeals below is not in conflict with the Supreme Court's decision in *Bisso.*

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24. *Id.* at 683-85; Fluor Western, Inc. v. G & H Offshore Towing Co., 447 F.2d 35, 39 (5th Cir.), *cert. denied,* 405 U.S. 922 (1972). Nor is lack of mutuality with respect to the insurance obligations of the parties any evidence of overreaching. BASF Wyandotte Corp. v. Tug Leander, Jr., 590 F.2d 96 (5th Cir. 1979).

25. Voisin v. O.D.E.C.O. Drilling Co., 744 F.2d at 1179.

26. Hercules, Inc. v. Stevens Shipping Co., Inc., 698 F.2d 726 (5th Cir. 1983) (en banc); Fluor Western, Inc. v. G & H Offshore Towing Co., 447 F.2d 35 (5th Cir.), *cert. denied,* 405 U.S. 922 (1972); Hartford Fire Ins. Co. v. Port Everglades Towing Co., Ltd., 454 F.2d 276 (5th Cir. 1972). *Accord,* Dillingham Tug & Barge Corp. v. Collier Carbon & Chemical Corp., 707 F.2d 1086 (9th Cir. 1983).

27. *E.g.,* Dillingham Tug & Barge Corp. v. Collier Carbon & Chemical Corp., 707 F.2d 1086, 1089 (9th Cir. 1983).

B. The Decision Of The Fifth Circuit Is Not Contrary To Decisions Rendered By Other Circuit Courts.

The Fifth Circuit's decision is fully supported by and consistent with the Ninth Circuit Court of Appeals' decision in *Price v. Zim Israel Navigation Co., Ltd.*,[28] which is the only additional circuit court decision addressing the central issue presented in the case at bar.

In *Price*, the Ninth Circuit upheld the validity of an additional assured provision in a contract between a vessel owner and a stevedore in the face of an argument that the provision was nullified by the statutory proscription of employer liability in Section 905(b). After careful consideration of the 1972 Amendments to the Act and the legislative history thereto, the *Price* court found no evidence of congressional intent to prohibit the insurance procurement provision before it.[29] The Ninth Circuit concluded that an additional assured provision does not make an employer directly or indirectly liable to the vessel, but merely allocates the responsibility for procuring insurance between the employer and the vessel owner.[30]

The holding of the Fifth Circuit below is premised on the same considerations, and is fully supported by and consistent with the decision of the Ninth Circuit Court of Appeals in *Price*.[31] The Petitioner suggests that the instant case can be factually distinguished from *Price* and that a "conflict" between the circuits therefore exists.

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28. 616 F.2d 422 (9th Cir. 1980).

29. *Id.* at 429. *See also* Bloomer v. Liberty Mutual Ins. Co., 445 U.S. 81, 84-85 (1980).

30. 616 F.2d at 429.

31. *See* Voisin v. O.D.E.C.O. Drilling Co., 744 F.2d at 1177, 1178.

However, this argument is not persuasive. While the Petitioner correctly notes that *Price* involved an action by a vessel owner against the insurer of a stevedore that, pursuant to contract, had procured liability insurance naming the vessel owner as an additional assured, the argument advanced by the insurer in *Price* and rejected by the Ninth Circuit Court of Appeals is precisely that which has been urged by the Petitioner. The instant case is distinguishable from *Price* only because the Petitioner, unlike the employer in *Price,* breached a contractual obligation to procure insurance naming Respondent as an additional assured.[32] The *Price* court upheld such an agreement in the face of an argument that it violated the statutory proscription of employer liability under Section 905(b) of the Act, and the holding in *Price* fully supports the imposition of liability upon the Petitioner for breach of contract in the case at bar.

Contrary to the assertions of the Petitioner, the Fifth Circuit's decision does not contravene the proscription against employer liability contained in Section 905(b) of the Act. The insurance provisions of the Master Service Contract do not by indirection or otherwise cast liability upon the Petitioner for personal injuries of employees such as the Plaintiff. Rather, the Petitioner's liability is a direct and proximate result of its breach of the Master Service Contract by failing to obtain the appropri-

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32. Petitioner correctly notes that the Fifth Circuit has equated the employer's compensation insurer with the employer for purposes of the Longshoremen's & Harbor Workers' Compensation Act. *See* Nation v. Morris, 483 F.2d 577, 589 (5th Cir. 1973); Johnson v. American Mutual Liability Ins. Co., 559 F.2d 382, 388 (5th Cir. 1977). Refer to Petitioner's Petition for Writ of Certiorari at pp. 8-9. The decisions, however, merely underscore the lack of any material distinction between *Price* and the Fifth Circuit's decision in this case.

ate insurance, and not a liability arising in an indemnity context.[33] It is clear from the record, and the Fifth Circuit correctly held,[34] that the Petitioner's breach of contract necessarily caused the Respondent to pay monies it would not otherwise have owed in connection with the Plaintiff's claim, and well settled principles of contract law support the Respondent's entitlement to recover from Petitioner its damages resulting from Petitioner's breach of contract.[35]

CONCLUSION

The necessary elements for writ of certiorari are completely absent in this case. The Fifth Circuit's decision in the instant case is not in conflict with any decision of this Court construing the 1972 Amendments to the Act and the legislative history thereto. Further, the holding of the Fifth Circuit below is not in conflict with the Court's decision in *Bisso v. Inland Waterways Corporation.* Nor is the decision of the Fifth Circuit contrary to decisions rendered by other circuit courts. Rather, the Fifth Circuit's decision is fully supported by and consistent with the decision of the Ninth Circuit Court of Appeals in *Price v. Zim Israel Navigation Co., Ltd.,* which is the only decision of another federal court of appeals on point.

In sum, the additional assured provision contained in Section 8(f) of the Master Service Contract contravenes neither the prudential considerations underlying *Bisso* nor the statutory proscription of employer liability in Section

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33. *See* Stewart v. Cran-Vela Rental Co., 510 F.2d 982, 985 (5th Cir. 1975). *See also* Ogea v. Loffland Bros. Co., 622 F.2d 186 (5th Cir. 1980).

34. Voisin v. O.D.E.C.O. Drilling Co., 744 F.2d at 1179.

35. Stewart v. Cran-Vela Rental Co., 510 F.2d at 985-86.

905(b) of the Longshoremen's & Harbor Workers' Compensation Act. The provision merely allocates initially the burden of procuring insurance and does not by indirection or otherwise require the Petitioner to indemnify the Respondent with respect to any damages assessed against it in a third-party action under Section 905(b). Rather, the Petitioner's liability in the case at bar is a direct and proximate result of its breach of the Master Service Contract by failing to obtain the appropriate insurance, and not a liability arising in an indemnity context. No decision rendered by this Court or by any of the appellate courts can be or has been cited which demonstrates that the Fifth Circuit's ruling in this case was improper. Accordingly, the Petition for Writ of Certiorari filed herein should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari upon L. Keith Slade, 8 Greenway Plaza, 1200 Cashco Tower, Houston, Texas 77046, the attorney for Petitioner herein, by placing the same in the United States Certified Mail, Return Receipt Requested, in a properly addressed package with adequate postage thereon, on this the 25th day of February, 1985.

OF ROYSTON, RAYZOR, VICKERY
& WILLIAMS